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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRAD BENNETT, ET AL.

Petitioners,

v.

MARVIN PLENERT, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE NATIONAL MULTI HOUSING COUNCIL, THE NATIONAL APARTMENT ASSOCIATION, AND THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES

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The Building Industry Amici have received the written consent of the parties to file this brief in support of petitioners, and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The National Association of Home Builders of the United States ("NAHB") represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[1]

The California Building Industry Association ("CBIA") is a not-for-profit corporation organized under the laws of the State of California. CBIA represents over 5,000 members who employ over 100,000 people. CBIA's members are involved in all aspects of the building and construction industry.[2]

The Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the State of California. The BILD is a wholly owned

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[1] The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan* v. *City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas* v. *South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Yee* v. *City of Escondido*, 112 S.Ct. 1522 (1992); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

[2] NAHB, CBIA, and the Building Industry Association of Southern California are affiliated trade associations working in concert for the benefit of the entire home building industry.

subsidiary of the Building Industry Association of Southern California ("BIA-Southern California"). BIA-Southern California is an NAHB affiliate with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern California members are involved in the construction of 70% of all new homes in the Southern California Region.[3]

The National Multi Housing Council ("NMHC") represents the interests of the Nation's largest owners and operators of multifamily rental housing, including ownership, building, financing, and management involving millions of rental housing units. Since its formation in 1978, the NMHC has been actively involved in all facets of public policy that are of strategic importance to participants in the multifamily housing industry.

The National Apartment Association ("NAA") brings together state and local associations of owners, builders, investors, developers, and managers of multifamily properties. It provides education and training for the multifamily industry and works on local, state, and national legislative issues. NAA represents over 26,000 members who own and manage over 3 million multifamily units nationwide.

The National Association of Industrial and Office Properties ("NAIOP") is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and around the world. NAIOP's members include commercial real estate developers, architects, brokers, master planners, engineers, property managers, banks, and insurance companies.

The Building Industry Amici's interests lie in seeing that the impiementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with

[3] The BILD's mission is to "[d]efend the legal rights of home and property owners." The BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

government actions which impinge on constitutional guarantees.[4] The Building Industry Amici have a particular interest in the administration of federal environmental statutes such as the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§1531-1544, given the far-reaching impact that these laws have upon private land use and land-use regulation.

SUMMARY OF ARGUMENT

The effect of the Ninth Circuit's decision is to remove any judicial check on the Interior Department's administration and enforcement of the ESA. The Ninth Circuit would close the courthouse doors to regulated parties who bear the burdens of ESA regulation and give free rein to environmental groups to encourage and, indeed, force the ESA's expansion. This result, stripping regulated parties of any means to defend themselves, is without precedent. This Court should reverse the Ninth Circuit's decision.

ARGUMENT

The United States Court of Appeals for the Ninth Circuit's decision held that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."[5]According to that court:

> Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding

[4] As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[5] *Bennett* v. *Plenert*, 63 F.3d 915, 919 (1995).

the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives." [6]

As argued below, the issue of standing to challenge ESA determinations is of critical importance to property owners generally, and the Building Industry Amici's members specifically. The Ninth Circuit has neutered property owners' ability to protect themselves in court from unlawful ESA regulation. Moreover, the Ninth Circuit only reached its decision by ignoring the will of Congress and by rewriting this Court's prudential standing test.

A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country

The impact of the Ninth Circuit's decision cannot be understated. As this Court recognized in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995), the ESA provides for the federal regulation of land which constitutes endangered species' habitat. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabit non-federal lands. Of these listed species, 517 have over 60% of their total habitat on non-federal lands. [7]

The habitat for these species and the 185 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions of acres. [8] The designation of such critical habitat imposes on all

[6] *Bennett*, 63 F.3d at 919.

[7] See General Accounting Office, Endangered Species Act: Information on Species Protection on Non-Federal Lands, 4-5 (Dec. 1994).

[8] For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl in this case. The Secretary has also designated 3.9 million acres as critical habitat for the marbled murrelet, 61 *Fed. Reg.* (decision announced on May 15,

(footnote continues)

federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat 16 U.S.C. §1536(a)(2). This obligation extends to all types of federal actions, including actions relating to private property, *e.g.*, federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§1251-1387; and the Clean Air Act, 42 U.S.C. §§7401-7671q; and, the provision of federal flood insurance.[9] These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA. [10]

(footnote continued)

1996); 4.6 million acres for the Mexican spotted owl, and its tributaries, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. §17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento — San Juaquin River delta — which lies at the heart of the water system serving much of the State of California — as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

[9] Thus, no comfort can be drawn from the Ninth Circuit's disclaimer that it was not ruling on the standing of directly regulated parties, but rather only on indirectly regulated parties. *Bennett*, 63 F.3d at 917, fn. 2. The effect of an ESA regulation upon the regulated party is just as real even when filtered through another federal agency.

[10] For instance, the Secretary has proposed to designate 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.* 25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or*

(footnote continues)

The designation of critical habitat, particularly on this scale, can have significant environmental impacts on property owners. However, due to their "competing interest"[11] (i.e. — the desire to use their land), property owners under the jurisdiction of the Ninth Circuit will not be able to challenge critical habitat designations under the ESA.

B. ESA Regulations Create Real Problems For Real People

The burdens imposed by the ESA upon individuals, as well as upon state and local governments, are neither hypothetical or imagined; indeed, the following examples illustrate that these burdens are not overstated.

For instance, the listing of the Delhi Sands Flower-loving Fly ("Fly") resulted in the United States Fish & Wildlife Service ("Service") requiring San Bernardino County to move the "footprint" of its new County Medical Center 250 feet in order to lessen the impact of construction upon an estimated 6-8 Flies. This requirement cost San Bernardino County citizens more than $4,000,000.00, approximately $500,000.00 per Fly. [12] The Service also demanded that San Bernardino County close Interstate 10 during the months of August and September annually, or, alternatively, to lower the speed limit to 15 m.p.h. [13] The

(footnote continued)

Rights, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. *See* 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

[11] *Bennett*, 63 F.3d at 921.

[12] The application of these monies to the provision of healthcare would have treated 522 inpatients or 24,993 outpatients.

[13] Interstate 10 is an eight lane freeway providing the primary road access to Los Angeles from the east. The apparent thinking by the Service was that a Fly could wander onto the highway only to be struck by a passing

(footnote continues)

Service is also currently blocking the improvement of a road intersection critical to providing emergency access to the new County Medical Center. [14]

The Service's decision to restrict logging in Arizona's Kaibab National Forest as a measure of affording protection to the Mexican Spotted Owl has virtually destroyed the Kaibab Forest Products Company. The Service closed approximately 30,000 acres to logging operations, a decision affecting 10 owls. The provision of almost 3,000 acres per owl cost Kaibab Forest Products Company more than $3,000,000.00. Moreover, over 1400 people lost their jobs due to the company's sudden inability to harvest timber.

Twenty-eight families lost their homes in Riverside County, California when the Service refused to let them clear fire-breaks to protect their homes from wildfires. The Service's position was that the vegetation removal inherent in clearing fire-breaks would destroy habitat for the Stephens Kangaroo Rat. [15]These families who heeded the Service's threats of criminal and civil sanctions ended up losing their habitat.

On August 18, 1993, the Service listed as endangered two (2) so-called "cave bugs" — the Coffin Cave Mold Beetle and the Bone Cave Harvestman — without undergoing any of the requisite notice and comment procedures. The listing of the Bone Cave Harvestman forced Austin, Texas home builder Ed Wendler, Jr. to set aside 90 acres of real property for the benefit

(footnote continued)

motor vehicle. This accidental contact would, technically speaking, result in a "take" of the Fly in violation of 16 U.S.C. §1538 (a)(1)(B).

[14] NAHB, CBIA, BILD, Colton, Fontana, and San Bernardino County, California have filed an action against Secretary Babbitt — *NAHB* v. *Babbitt*, Civ. No. 1:95CV01973 RMU (D.D.C. 1995) — challenging the Interior Department's authority to enforce certain provisions of the ESA in connection with its listing of the Fly as endangered. That action involves standing issues similar to those raised by petitioners in this case.

[15] This ignores, of course, the fact that fires would accomplish the same result.

of this "cave bug". The cost of the land alone was $1,170,000.00.[16] This loss was the direct result of an endangered species listing by "executive fiat" in violation of the ESA.[17]

Finally, the Sierra Club — a group not adversely affected by the Ninth Circuit's decision — sued pursuant to the ESA's citizen suit provisions to block development in San Antonio, Texas based upon the potential impact on the Edwards Aquafier. The Aquafier is not only a major source of water for the region, it is also the habitat of the Texas Blind Salamander and the San Marcos Salamander. The effect of that suit and its remedy will be to tie up thousands of acres of private property.

All of these actions, and many more, were administrative actions taken by the Service pursuant to the ESA. Most all Service actions concerning "habitat" arise from the regulatory definitions contained in 50 C.F.R. §17.3.[18] The regulations are not promulgated by Congress, nor are the regulations subjected to Congressional review. Thus, in light of the fact that regulations are promulgated, administered, and enforced by the Executive Branch, the judicial branch is the only place where aggrieved regulated parties can turn for relief.

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[16] Other costs include more than $100,000.00 which Mr. Wendler was forced to spend on biological surveys, as well as lost profits for the anticipated construction and sale of homes lost to "cave bug" preservation.

[17] The NAHB and its affiliate, the Texas Capitol Area Builders Association ("TxCBA"), have challenged this action. In *NAHB and TxCBA* v. *Babbitt*, C.A. No. 1:95CV01374 RMU (D.D.C. 1995), the district court has been asked to invalidate a final rule listing 2 species as endangered under the ESA which was promulgated without undergoing the requisite notice and comment process. The Interior Department has challenged NAHB's and TxCBA's standing to bring this action predicated upon the Ninth Circuit's decision.

[18] The Service's regulatory definition of "harm" was the subject of this Court's decision in *Sweet Home*.

C. The Ninth Circuit Decision Ignores The Will Of Congress

The Building Industry Amici agree with petitioners that it was error for the Ninth Circuit to apply the zone of interests test to the subject ESA claims. Congress clearly and unequivocally extended standing under the ESA to the limits of Article III of the United States Constitution through its enactment of 16 U.S.C. §1540 (g)(1). That provision allows *any* person to bring suit to challenge the Secretary's actions under the ESA.

The term "person" is liberally defined in the ESA to mean:

> an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any state or political subdivision thereof, or any foreign government.

16 U.S.C. §1532 (13). Notably, there is no qualification within this definition such as to exclude a "person" with a "competing interest" or to restrict standing to a person who *only* seeks to further the ESA's statutory objectives. Rather, the standing conferred under the ESA is broad, open-ended, and inclusive.

D. The Ninth Circuit Decision Rewrites The Zone Of Interests Test

Assuming *arguendo* that the zone of interests test does indeed apply to ESA claims, the Ninth Circuit's decision misapplied the test completely, rewriting the test so as to exclude those persons *regulated* by the ESA.[19] This is contrary to this Court's clear mandate that the zone of interests test included those whose interests are sought to be protected which fall within either the "zone of interests to be protected *or* regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp.*, 397 U.S.

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[19] This group would include not only petitioners, but the Building Industry Amici's members, as well as most all property owners and users generally.

150, 153 (1970). *See also Clarke* v. *Securities Industry Ass'n.*, 479 U.S. 388 (1987).

Both petitioners and the Building Industry Amici's members clearly fall within the category of those Congress intended to regulate under the ESA. Through the "take" provisions contained in 16 U.S.C. §1538, along with the permitting provisions of 16 U.S.C. §§1536 and 1539, and the accompanying regulations, the ESA acts to closely regulate the use of land which may be occupied by listed endangered species.[20] Individuals are prohibited from harming endangered animals, including habitat modifications which significantly impair an animal's behavioral partners. *See Sweet Home*, 115 S.Ct. 2407 (1995). These provisions become effective as soon as a species is listed as endangered, requiring landowners to immediately conform their conduct to this requirement. [21]Therefore, there can be no argument that petitioners are regulated by the ESA. As such, petitioners should have standing to challenge ESA determinations in court.

[20] The "use of land" is, of course, the foundation — both literally and figuratively — of the building and construction industry. Moreover, in this case, petitioners are regulated in their use of the water which constitutes the habitat of the Lost River sucker and the short nose sucker.

[21] As this Court noted, the ESA "encompasses a vast array of economic and social enterprises and endeavors." *Sweet Home*, 115 S.Ct. at 2418.

E. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties

The United States Constitution, Article III, limits the jurisdiction of the federal courts to the resolution of "cases" or "controversies". *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 469, 471 (1982). Common sense dictates that the essence of an "actual case or controversy" would necessarily involve the existence of "competing interest[s]". The Ninth Circuit, however, in its zeal to ensure the primacy of endangered species protection, prevents any meaningful challenge to the Secretary's actions. By virtue of its decision, only those "persons" without any "competing interest[s]" will be allowed to bring a court challenge under the ESA. Thus, while environmental interest groups will be free to act to enforce the ESA to its maximum potential, those "persons" who bear the burden of the ESA regulation — property owners — will be at the mercy of the Department of the Interior.[22] In the event that a species is mistakenly or improperly listed, the regulated parties who have an interest in correcting the mistake, will be forced to rely upon the non-regulated parties who have no interest in (and, indeed, may be opposed to) correcting the mistake.[23]

[22] "Those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden :han that contemplated by Congress." *Hazardous Waste Treatment Council* v. *Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

[23] Nor is the ESA the only environmental statute potentially affected by the Ninth Circuit's ruling. The Clean Water Act, 33 U.S.C. §§1251-1387, Clean Air Act 42 U.S.C. §§7401-7671(q), and Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992(k), all contain broadly worded citizen suit provisions similar to that contained in the ESA. Assuming *arguendo* the correctness of the Ninth Circuit's decision, there is no logical impediment to its extension to these statutes, preventing regulated parties from challenging administrative actions. The end result will be to insulate federal agencies from any check upon their actions by adversely affected parties.

The ability to protect one's interests in court historically has constituted a fundamental American right. Yet the Ninth Circuit's decision in this case abrogates that right for those who possess a "competing interest" with an endangered species. In other words, property owners will have to trust the Department of the Interior to administer the ESA in a manner which does not infringe upon their rights.[24] Moreover, environmental groups who may oppose property development and growth will be able to use the ESA as a weapon to prevent property owners' activities; the property owners, however, will be without the means to defend themselves.

CONCLUSION

Therefore, for the reasons stated above, and in the Brief for Petitioners, the Building Industry Amici pray that this Court REVERSE the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[24] Based upon past actions, there is little basis for property owners to "trust" the Interior Department. Indeed, on at least (1) occasion, the Interior Department has taken the position that when it acts for the benefit of endangered species, its actions are immune from challenge, and not subject to judicial review. *See Mausolf* v. *Babbitt*, 913 F. Supp. 1334, 1342 fn. 13 (D. Minn. 1996). In *Mausolf*, the District Court rejected the Interior Department's dubious claim, stating that it was "unwilling to adopt the view that the FWS [Service] is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue. . . . " *Mausolf*, 913 F. Supp. at 1342. The reversal by this Court of the Ninth Circuit's decision is absolutely necessary to protect property owners from the Interior Department's "totalitarian virtue."

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